

Agreed Order

Little Squalicum Park
Bellingham, WA

Signed: March 2005

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

In the Matter of Remedial Action by:)	
)	
City of Bellingham)	AGREED ORDER
)	FOR RI/FS
)	No. DE 2016
)	

To: The City of Bellingham
210 Lottie Street
Bellingham, WA 98225-4089

I.
Jurisdiction

This Agreed Order ("Order") is issued pursuant to the authority of RCW 70.105D.050(1).

II.
Findings of Fact

The Washington State Department of Ecology ("Ecology") makes the following Findings of Fact, without admission of such facts by the City of Bellingham ("City").

1. Little Squalicum Park is located at 604 Marine Drive in Bellingham, Washington (the "Site") and is owned by the City, Whatcom County (County), Burlington Northern & Santa Fe Railway and the Port of Bellingham. The portion owned by the County is leased to the City pursuant to a lease dated February 18, 1992 (the "Lease"). The Site area is generally depicted in Exhibit A of this Agreed Order.
2. Investigations conducted at the Site include:
 - (i) The Oeser Company Superfund Site Bellingham, Washington, Remedial Investigation Report, dated June 2002, by Ecology and Environment, Inc.
 - (ii) Little Squalicum Creek Biological Toxicity Assessment, dated April 2004, by the Washington State Department of Ecology Environmental Assessment Program.
3. The above-listed investigations have confirmed the presence of hazardous substances in the following: Site surface water, groundwater, soil and sediments, including

pentachlorophenol, dioxin, copper, zinc and polycyclic aromatic hydrocarbon ("PAH") compounds.

4. In February 2004 Ecology conducted a Site Hazard Assessment and placed the Site on the Hazardous Sites List. The Site is ranked Number 1, where 1 represents the highest relative risk and 5 the lowest relative risk.
5. In order to protect human health and the environment and to prevent the release or threatened release of hazardous substances from the Site, Ecology has determined that a Remedial Investigation and Feasibility Study (RI/FS) should be developed pursuant to WAC 173-340-350 and WAC 173-204-560 for the Little Squalicum Creek site.

III.

Ecology Determinations

Ecology makes the following determinations, without admission or agreement of the accuracy or completeness of the determinations by the City:

1. The City is an "owner" as defined at RCW 70.105D.020(11) of a "facility" as defined in RCW 70.105D.020(4).
2. The facility is known as Little Squalicum Park and is located at 604 Marine Drive in Bellingham, Washington.
3. The substances found at the facility as described above are "hazardous substances" as defined at RCW 70.105D.020(7).
4. Based on the presence of these hazardous substances at the facility and all factors known to Ecology, there is a release or threatened release of hazardous substances from the facility, as defined at RCW 70.105D.020(19).
5. By letter dated February 18, 2004, without admitting liability and for purposes of facilitating this Order, the City voluntarily waived its right to the 30-day notice and comment period and accepted its status as a "potentially liable person" under RCW 70.105D.040.
6. Pursuant to RCW 70.105D.030(1) and 70.105D.050, Ecology may require potentially liable persons to investigate or conduct other remedial actions with respect to the release or threatened release of hazardous substances, whenever it believes such action to be in the public interest.

7. Based on the foregoing facts, Ecology believes the remedial action required by this Order is in the public interest.

IV.
Work to be Performed

Based on the foregoing Facts and Determinations, it is hereby ordered that the City complete a Remedial Investigation/ Feasibility Study (RI/FS) for the Site pursuant to WAC 173-340-350 and WAC 173-204-560, as follows:

1. The RI/FS shall be conducted in accordance with the Scope of Work attached as Exhibit B and hereby incorporated by reference as an enforceable part of this Agreed Order.
2. All data collected shall be submitted to Ecology in SEDQUAL and EIM electronic data formats.
3. All documents shall be submitted to Ecology in hard copy and electronic form.
4. During performance of this Order, the City shall submit written progress reports to Ecology in accordance with Exhibit B.

V.
Terms and Conditions of Order

1. Definitions
Unless otherwise specified, the definitions set forth in chapter 70.105D RCW and chapter 173-340 WAC shall control the meanings of the terms used in this Order.
2. Public Notices
WAC 173-340-600(10)(c) requires a 30 day public comment period before this Order becomes effective. Ecology shall be responsible for providing such public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that the Order is inadequate or improper in any respect.
3. Remedial Action Costs
The City shall pay to Ecology costs incurred by Ecology pursuant to this Order. These costs shall include work performed by Ecology or its contractors for investigations, remedial actions, and Order preparation, oversight and administration. Ecology costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). The City shall pay the required amount within 90 days of receiving from Ecology an itemized statement of costs that includes a summary of costs

incurred, an identification of involved staff, and the amount of time spent by involved staff members on the project. A general description of work performed will be provided upon request. Itemized statements shall be prepared quarterly. The City may invoke the Dispute Resolution process under §V, paragraph (9) of this Order if it disagrees with Ecology's oversight cost charges. Failure to pay Ecology's uncontested costs and costs for which a final decision has been issued under the Dispute Resolution process within 90 days of receipt of the itemized statement of costs or the date of the Dispute Resolution final decision will result in interest charges.

4. Designated Project Coordinators

The project coordinator for Ecology is:

Name: Mary O'Herron
Address: Department of Ecology
Bellingham Field Office
1204 Railroad Avenue, Suite 200
Bellingham, Washington 98225
Phone: 360-738-6246

The Project coordinator for the City is:

Name: Tim Wahl
Address: City of Bellingham
Parks and Recreation Department
3424 Meridian Street
Bellingham, Washington 98225-1764
Phone: 360-676-6985

The project coordinators shall be responsible for overseeing the implementation of this Order. To the maximum extent possible, communications between Ecology and the City, and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order, shall be directed through the project coordinators. Should Ecology or the City change project coordinators, written notification shall be provided to Ecology or the City at least ten (10) calendar days prior to the change.

5. Performance

All work performed pursuant to this Order shall be under the direction and supervision, as necessary, of a professional engineer or hydrogeologist, or similar expert, with appropriate training, experience and expertise in hazardous waste site investigation and cleanup. The City shall notify Ecology as to the identity of such engineer(s) or hydrogeologist(s), and of any contractors and subcontractors to be used in carrying out the terms of this Order, in advance of their involvement at the Site. The City shall

provide a copy of this Order to all agents, contractors and subcontractors retained to perform work required by this Order and shall ensure that all work undertaken by such agents, contractors and subcontractors will be in compliance with this Order.

Except where necessary to abate an emergency situation, the City shall not perform any remedial actions at the Site outside that required by this Order unless Ecology concurs, in writing, with such additional remedial actions. .

6. Access

Ecology or any Ecology authorized representative shall have the authority to enter and freely move about the Site at all reasonable times for the purposes of, inter alia: inspecting records, operation logs, and contracts related to the work being performed pursuant to this Order; reviewing the progress in carrying out the terms of this Order; conducting such tests or collecting samples as Ecology or the project coordinator may deem necessary; using a camera, sound recording, or other documentary type equipment to record work done pursuant to this Order; and verifying the data submitted to Ecology by the City. By signing this Order, the City agrees that this Order constitutes reasonable notice of access to the City, and agrees to allow access to the Site at all reasonable times for purposes of overseeing work performed under this Order. Ecology shall allow split or replicate samples to be taken by the City during an inspection unless doing so interferes with Ecology's sampling. The City shall allow split or replicate samples to be taken by Ecology and shall provide seven (7) days notice before any sampling activity.

7. Public Participation

Ecology shall prepare a public participation plan for the site in cooperation with the City. Ecology shall maintain the responsibility for public participation at the site. The City shall help coordinate and implement public participation for the site.

8. Retention of Records

The City shall preserve in a readily retrievable fashion, during the pendency of this Order and for ten (10) years from the date of completion of the work performed pursuant to this Order, all records, reports, documents, and underlying data in its possession relevant to this Order. Should any portion of the work performed hereunder be undertaken through contractors or agents of the City, then the City agrees to include in their contract with such contractors or agents a record retention requirement meeting the terms of this paragraph.

9. Dispute Resolution

In the event a dispute arises as to an approval, disapproval, proposed modification or other decision or action by Ecology's project coordinator, the City shall utilize the dispute resolution procedure set forth below. Upon receipt of the Ecology project coordinator's

decision, the Defendant has fourteen (14) days within which to notify Ecology's project coordinator of its objection to the decision.

- A. The parties' project coordinators shall then confer in an effort to resolve the dispute. If the project coordinators cannot resolve the dispute within fourteen (14) days, Ecology's project coordinator shall issue a written decision.
- B. Defendant may then request Ecology management review of the decision. This request shall be submitted in writing to the Northwest Region Section Manager for the Toxics Cleanup Program within seven (7) days of receipt of Ecology's project coordinator's decision.
- C. Ecology's Section Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute within thirty (30) days of the Defendant's request for review. The Section Manager's decision shall be Ecology's final decision on the disputed matter.

10. Reservation of Rights/No Settlement

This Agreed Order is not a settlement under ch. 70.105D RCW. Ecology's signature on this Order in no way constitutes a covenant not to sue or a compromise of any Ecology rights or authority. Ecology will not, however, bring an action against the City to recover remedial action costs paid to and received by Ecology under this Agreed Order. In addition, Ecology will not take additional enforcement actions against the City to require those remedial actions required by this Agreed Order, provided the City complies with this Agreed Order.

- A. Ecology reserves the right; however, to require additional remedial actions at the Site should it deem such actions necessary. The City expressly reserves their rights with regard to any future agency action.
- B. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the releases or threatened releases of hazardous substances from the Site.
- C. In the event Ecology determines that conditions at the Site are creating or have the potential to create a danger to the health or welfare of the people on the Site or in the surrounding area or to the environment, Ecology may order the City to stop further implementation of this Order for such period of time as needed to abate the danger. Any verbal order by Ecology to stop work shall be followed within forty eight (48) hours of such verbal order by written confirmation from Ecology to the City of such verbal order.

- D. Nothing herein shall be a waiver of the City's right to pursue any other responsible party for costs associated herewith.

11. Extension of Schedule

- A. An extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least 30 days prior to expiration of the deadline for which the extension is requested, and good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify the reason(s) the extension is needed.
- B. An extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. A requested extension shall not be effective until approved by Ecology. Ecology shall act upon any written request for extension in a timely fashion. It shall not be necessary to formally amend this Order when a schedule extension is granted.
- C. The burden shall be on the City to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. Good cause includes, but is not limited to, the following:
 - (1) Circumstances beyond the reasonable control and despite the due diligence of the City including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by the City; or
 - (2) Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty; or
 - (3) Endangerment of the health or welfare of the people on the Site or in the surrounding area or to the environment.

However, neither increased costs of performance of the terms of the Order nor changed economic circumstances shall be considered circumstances beyond the reasonable control of the City.

- D. Ecology may extend the schedule for a period not to exceed ninety (90) days, except where an extension is needed as a result of:
 - (1) Delays in the issuance of a necessary permit which was applied for in a timely manner; or

- (2) Other circumstances deemed exceptional or extraordinary by Ecology; or
- (3) Endangerment of the health or welfare of the people on the Site or in the surrounding area or to the environment.

Ecology shall give the City written notification in a timely fashion of any extensions granted pursuant to this Order.

12. Transference of Property

No voluntary or involuntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by the City without provision for continued implementation of all requirements of this Order.

Prior to transfer of any legal or equitable interest, the City may have in the Site or any portions thereof, the City shall serve a copy of this Order upon any prospective purchaser, lessee, transferee, assignee, or other successor in such interest. At least thirty (30) days prior to finalization of any transfer, the City shall notify Ecology of the contemplated transfer.

13. Compliance with Other Applicable Laws

- A. All actions carried out by the City pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits, except as provided in paragraph B of this section.
- B. Pursuant to RCW 70.105D.090(1), the substantive requirements of chapters 70.94, 70.95, 70.105, 75.20, 90.48, and 90.58 RCW and of any laws requiring or authorizing local government permits or approvals are to be included in the work documents approved by Ecology for this remedial action. Ecology has determined that the work under this Order does not implicate laws or regulations covered under RCW 70.105D.090(1).
- C. The City has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event the City determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order, they shall promptly notify Ecology of this determination. Ecology shall determine whether Ecology or the City shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, the City shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to

the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by the City and on how the City must meet those requirements. Ecology shall inform the City in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. The City shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

- D. Ecology shall ensure that notice and opportunity for comment is provided to the public and appropriate agencies prior to establishing the substantive requirements under this section.
- E. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency which is necessary for the State to administer any federal law, the exemption shall not apply and the City shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

14. Indemnification

To the extent permitted by law, the City agrees to indemnify and save and hold the State of Washington, its employees, and agents harmless from any and all claims or causes of action for death or injuries to persons or for loss or damage to property arising from or on account of acts or omissions of the City, its officers, employees, agents, or contractors in entering into and implementing this Order. However, the City shall not indemnify the State of Washington nor save nor hold its employees and agents harmless from any claims or causes of action arising out of the negligent acts or omissions of the State of Washington, or the employees or agents of the State, in implementing the activities pursuant to this Order.

VI.
Satisfaction of this Order

The provisions of this Order shall be deemed satisfied upon receipt by the City of written notification from Ecology that the City has completed the remedial activity required by this Order, as amended by any modifications, and that all other provisions of this Agreed Order have been complied with.

VII.
Enforcement

1. Pursuant to RCW 70.105D.050, this Order may be enforced as follows:
 - A. The Attorney General may bring an action to enforce this Order in a state or federal court.
 - B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.
 - C. In the event the City refuses, without sufficient cause, to comply with any term of this Order, the City will be liable for:
 - (1) up to three times the amount of any costs incurred by the state of Washington as a result of its refusal to comply; and
 - (2) civil penalties of up to \$25,000 per day for each day it refuses to comply.
 - D. This Order is not appealable to the Washington Pollution Control Hearings Board. This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order: _____

CITY OF BELLINGHAM

**STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

Mark Asmundson
Mayor

Steven M. Alexander, Section Manager
Toxics Cleanup Program

Date _____

Date _____

APPROVED AS TO FORM:

Office of the City Attorney

ATTEST:

Finance Director

DEPARTMENTAL APPROVAL:

Department Head